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Jurisdiction—Federal-State Conflict—Right to Exhaust Prior Jurisdiction, *Strand v. Schmittroth*, 233 F.2d 598 (9th Cir. 1956)

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the verdict. Such an extension of power would eliminate many costly new trials, lengthy appeals, and other injustices to the state and the defendant.³¹ Thus, it is submitted that, rather than follow the procedure of the principal case, adoption by the courts and/or legislatures of any procedure which would obtain these advantages would be a step forward in the administration of criminal justice.

JURISDICTION—FEDERAL—STATE CONFLICT—RIGHT TO EXHAUST
PRIOR JURISDICTION

Strand v. Schmittroth, 233 F.2d 598 (9th Cir. 1956)

Petitioner was arrested while he was on probation from a federal district court and was being held for prosecution by state authorities. He petitioned the district court from which he was on probation for a writ of habeas corpus, alleging that since he was a federal probationer the state had no authority to proceed against him. The writ was issued and petitioner released. The court of appeals affirmed, stating that the issuance of the writ by the district court constituted an objection to state invasion of federal jurisdiction.¹

It is well established that in criminal prosecutions a court has jurisdiction over the accused when he is before the court regardless of how his presence was secured.² Equally well established is the principle that in granting bail, parole, or probation, a sovereignty does not lose legal custody of the person.³ Thus, a conflict may arise, as in the principal case, where a court of one sovereignty acquires physical custody of an individual while he is in legal custody of another sovereignty. It is generally stated that such a conflict between sovereignties is to be resolved by an application of the rule of comity⁴ which provides that the sovereignty first acquiring jurisdiction (*S-1*) over a person has the right to exhaust its jurisdiction before a second sovereignty (*S-2*) may proceed against that person.⁵ In the leading case of

31. For such a suggestion, see MODEL PENAL CODE § 6.11 and comment (Draft No. 2, 1954) (limiting reduction to cases of an unduly harsh character).

1. *Strand v. Schmittroth*, 233 F.2d 598 (9th Cir. 1956), *rehearing denied*, 235 F.2d 756, *denial of rehearing vacated*, Letter from Laughlin E. Waters to Harold L. Satz, October 9, 1956.

2. *Frisbie v. Collins*, 342 U.S. 519 (1952); *Mahon v. Justice*, 127 U.S. 700 (1888); *Ker v. Illinois*, 119 U.S. 436 (1886).

3. *Taylor v. Taintor*, 83 U.S. (16 Wall.) 366, 373 (1872) (bail); *United States ex rel. Lombardo v. McDonnell*, 153 F.2d 919, 920 (7th Cir. 1946) (parole); *Grant v. Guernsey*, 63 F.2d 163 (10th Cir. 1933) (probation).

4. *Ponzi v. Fessenden*, 258 U.S. 254 (1922); *United States v. Marrin*, 227 Fed. 314, 318 (E.D. Pa. 1915).

5. *Ponzi v. Fessenden*, 258 U.S. 254 (1922); *Taylor v. Taintor*, 83 U.S. (16 Wall.) 366, 370 (1872). The doctrine has been extended to jurisdiction over property. *Covell v. Heyman*, 111 U.S. 176, 180 (1884). This principle applies whether the *S-1* sovereign is a state or the federal government. *Covell v. Heyman*, *supra*;

Ponzi v. Fessenden,⁶ however, the Supreme Court held that an *S-2* court may proceed against one in the legal custody of *S-1* when an administrative officer of *S-1* has given his consent to such a proceeding.

In finding a consent which will enable *S-2* to proceed against an individual despite the rule of comity, courts have not confined themselves to an affirmative manifestation of consent by an official or agency of *S-1*, but have developed the rule that the *lack of an objection* by *S-1* is consent.⁷ In the great majority of reported cases in this area, the individual on bail, probation, or parole from *S-1*, who is in the physical custody of *S-2*, has raised in the *S-2* courts the question of the propriety of *S-2* exercising its jurisdiction. From the reported cases one may conclude that as a practical matter *S-1* officials rarely, if ever, go into an *S-2* court and *object* to the proceedings against one under the legal custody of *S-1*.⁸ Thus, the *S-2* courts in almost all cases find consent from the lack of such objection and, with the aid of this "objection rule," proceed against the party without any interference with their exercise of jurisdiction.

In a very few instances the propriety of *S-2* exercising its jurisdiction has been questioned, not in the courts of *S-2*, but rather in the courts of *S-1*. Where there has been an affirmative manifestation of consent in the courts of *S-2* by an official of *S-1*, the courts of *S-1* are constrained to dismiss a petition for habeas corpus.⁹ When no such manifestation exists, the further question arises, as in the principal case, whether the courts of *S-1* can, by issuing a writ of habeas corpus, object to *S-2* exercising its jurisdiction.

Of the few cases arising in the courts of *S-1* there are two which lend support to the position taken in the principal case. In *Grant v. Guernsey*,¹⁰ which involved facts identical to those of the principal case, a court of appeals affirmed a district court's issuance of a writ of habeas corpus effecting the release of *its* probationer from state custody. In the *Grant* case, however, the court did not concern itself with the problem whether the district court was objecting to the exer-

Hagen v. Lucas, 35 U.S. (10 Pet.) 400, 403 (1836). The scope of this comment is confined to federal-state conflicts and does not include state-state conflicts which involve the further consideration of interstate rendition.

6. 258 U.S. 254 (1922).

7. *Hebert v. Louisiana*, 272 U.S. 312 (1926); *Stripling v. United States*, 172 F.2d 636 (10th Cir. 1949); *Rawls v. United States*, 166 F.2d 532 (10th Cir. 1948). *S-2* courts will find consent where *S-1* files a bill of detainer seeking to regain custody of an individual only after *S-2* has exhausted its jurisdiction. *Rosenthal v. Hunter*, 164 F.2d 949 (10th Cir. 1947); *United States v. Robinson*, 74 F. Supp. 427 (W.D. Ark. 1947).

8. No cases have been found where an officer of *S-1* has *objected* to *S-2* jurisdiction in the courts of *S-2*.

9. *Ponzi v. Fessenden*, 258 U.S. 254 (1922); *In re Andrews*, 236 Fed. 300 (D. Vt. 1916).

10. 63 F.2d 163 (10th Cir. 1933).

cise of jurisdiction by *S-2*, but simply applied the basic precept of comity—that *S-2* may not proceed against an individual who is in the legal custody of *S-1*. In the case of *United States ex rel. Pasela v. Fenno*,¹¹ the petitioner, while on bail from a federal district court, was recalled into the navy and court-martialed. The appellate court, in affirming the district court's dismissal of the petition for a writ of habeas corpus, stated that when the order was entered in the district court from which petitioner was on bail, the district court was consenting to the jurisdiction of *S-2*. Apparently this court would hold that the issuance of a writ under similar circumstances would be a proper objection to *S-2* exercising its jurisdiction.

In *United States ex rel. Spellman v. Murphy*,¹² however, the appellate court reversed a district court's issuance of a writ which removed *its* probationer from state custody, holding that since the petitioner was physically present in *S-2* that sovereignty had authority to proceed against him. But the court also stated that the offended sovereignty, *S-1*, could invoke the rule of comity against *S-2* and secure custody of the petitioner. Since the court conceded *S-1* had recourse against *S-2*, but still reversed the issuance of habeas corpus, the case indicates that the issuance of a writ of habeas corpus by the district court from which the petitioner is on probation is not an objection to *S-2* exercising its jurisdiction. Further support for this position is found in *Ex parte Marrin*¹³ in which the district court stated that since no officer of the department of justice of *S-1* had objected to the jurisdiction of *S-2*, the *S-1* court could not secure the release of the prisoner by issuing a writ of habeas corpus.

When *S-2* is faced with the prospect of having an *S-1* court remove a party from its custody, it may attempt to evade the interference with its jurisdiction by arguing before the *S-1* court that *only S-1* can object to the *S-2* exercise of jurisdiction,¹⁴ and that therefore, the petitioner, who is in fact the one raising the objection, has no standing in the courts of *S-1*.¹⁵ Another argument which may be presented by

11. 167 F.2d 593 (2d Cir. 1948).

12. 217 F.2d 247 (7th Cir. 1954).

13. 164 Fed. 631 (E.D.N.Y. 1908).

14. See, e.g., *Rawls v. United States*, 166 F.2d 532, 533 (10th Cir. 1948). Some courts state that the petitioner has "no right to raise the issue" of an improper exercise of jurisdiction by *S-2*. *Craig v. Hunter*, 167 F.2d 721 (10th Cir. 1948); *Florio v. Edwards*, 80 F.2d 509 (5th Cir. 1935); *In re Fox*, 51 Fed. 427 (N.D. Cal. 1892). It is not clear whether these courts mean the petitioner has no standing to raise the issue by petition for a writ of habeas corpus or whether, in fact, that while petitioner may call the court's attention to an invasion of its jurisdiction in this manner, only an objection by a representative of *S-1* may properly defer *S-2*'s exercise of its jurisdiction. For courts clearly adopting the latter approach, see *Rawls v. United States*, 166 F.2d 532, 533 (10th Cir. 1948); *Grant v. Guernsey*, 63 F.2d 163 (10th Cir. 1933).

15. See, e.g., *United States ex rel. Spellman v. Murphy*, 217 F.2d 247 (7th Cir. 1954).

the officials of *S-2* in such a situation is that there has been no objection by the court of *S-1*, or an official of *S-1*, *in the courts of S-2*.¹⁶ These arguments seem to be without merit, for if *S-1* has the right to object and preclude *S-2* from proceeding against the petitioner, it would seem to be immaterial in what manner *S-2* is notified of the *S-1* objection.

It is submitted that *S-2* courts, jealously guarding their jurisdiction and desiring to proceed against defendants when they are before the courts,¹⁷ have given only nominal recognition to the rule of comity. The rule is in most instances evaded by the application of the "objection rule" for, as noted previously, rarely is there any objection by officials of *S-1* in the *S-2* proceeding. Since *S-2* has a vital interest in the timely prosecution of alleged criminals within its jurisdiction,¹⁸ the results reached by the *S-2* courts in the probation and parole cases seem both justified and desirable. It seems wholly unreasonable to hold, as did the court in the principal case, that probation or parole is a protective cloak of immunity which defers prosecution for criminal offenses until after the parole or probationary period has expired.

A holding such as that in the principal case is the result of *S-2* courts giving recognition to the rule of comity and, in fact, circumventing it by applying the "objection rule." Such reasoning by the *S-2* courts¹⁹ leaves the door open to an interference with their jurisdiction when the defendant seeks a writ of habeas corpus in an *S-1* court. It would not be unrealistic for courts to recognize that a *parolee* or *probationer* is in the legal custody of *S-1* for purposes of rehabilitation and summary proceedings for violation of parole or probation, but that for purposes of determining whether *S-2* may proceed against such a party, he is not in the legal custody of *S-1* in the sense that an *S-2*

16. Brief for Appellant, p. 6, *Strand v. Schmittroth*, 233 F.2d 598 (9th Cir. 1956) (Appellant argued there had been no objection *in the state court* by the federal court or a federal court officer.).

17. An apt illustration of a court's reluctance to decline exercising its jurisdiction over the person once such jurisdiction attaches is found in a series of cases from the tenth circuit. In *Grant v. Guernsey*, 63 F.2d 163 (10th Cir. 1933), the court, acting as an *S-1* court, removed its probationer from state custody through the issuance of a writ of habeas corpus, stating that under the rule of comity no other jurisdiction could proceed against the prisoner until the *S-1* jurisdiction was exhausted. Later, however, in *Rawls v. United States*, 166 F.2d 532, 533 (10th Cir. 1948), the court, now acting as an *S-2* court, refused to release a prisoner who was on parole from an *S-1* jurisdiction, stating that since *S-1* had not objected to the jurisdiction of this court it could proceed. In *Craig v. Hunter*, 167 F.2d 721 (10th Cir. 1948), the court entered a similar holding to that in the *Rawls* case even though the petitioner was an escapee from an *S-1* prison.

18. As time passes witnesses die, or are hard to locate; memories become vague; and prosecuting officials are less likely to conduct the prosecution of a "stale" case. *Ponzi v. Fessenden*, 258 U.S. 254, 264 (1922).

19. It should be recalled that the "objection rule" is largely a product of *S-2* courts seeking to evade the impact of the rule of comity. See text supported by note 7 *supra*.

prosecution is precluded by the rule of comity.²⁰ Such an analysis eliminates the "objection rule" and renders the rule of comity inapplicable. Thus, the same results will be reached as are now being attained in the great majority of cases.²¹ In addition, *S-1* will be precluded from objecting to *S-2's* exercise of jurisdiction in the few instances where, as in the principal case, habeas corpus is sought in a court of *S-1*. On the other hand, where the party is on *bail* from *S-1*, it is submitted that there should be a strict adherence to the rule of comity in the absence of a "real" consent by *S-1*. In this situation *S-1* is actively engaged in prosecuting the individual on bail, and it would seem that in the interest of comity and the due administration of justice, *S-1* should be able to proceed without interference from another sovereignty.

TAXATION—TAX COURT—POWER TO VACATE A FINAL DECISION

Lasky v. Commissioner, 235 F.2d 97 (9th Cir. 1956), cert. granted,
25 U.S.L. Week 3133 (U.S. Aug. 31, 1956) (No. 371)

Four months after a decision¹ had been rendered, the taxpayer filed a motion in the tax court to vacate the decision and to grant a rehearing, on the ground of excusable neglect of counsel. Although the Internal Revenue Code provides that a decision of the tax court becomes *final* after expiration of the three-month period allowed for filing a petition for review,² the tax court concluded that extraordinary circumstances existed which warranted granting the motion. On rehearing the tax court again held for the Commissioner³ and the taxpayer filed a timely petition for review in the court of appeals. The court, in dismissing the petition for review, held that since the first decision of the tax court had become final under the statute, the tax court as an administrative agency had no inherent power to vacate such a decision; and hence, the court of appeals was without jurisdiction to review the second decision.⁴

The result in the principal case is consistent with the majority of cases dealing with the power of the tax court to vacate a decision after the expiration of the period for review.⁵ These cases, however, in

20. See *Strand v. Schmittroth*, 233 F.2d 598, 610 (9th Cir. 1956) (dissenting opinion). ("One can be subject to a court's orders without being in the full 'custody of the law,' without having a protective casing of immunity.")

21. See text supported by notes 7-8 *supra*.

1. *Bessie Lasky*, 22 T.C. 13 (1954).

2. INT. REV. CODE OF 1954, §§ 7481(1), 7483.

3. *Bessie Lasky*, P-H 1955 T.C. Mem. Dec. ¶ 55254-A.

4. *Lasky v. Comm'r*, 235 F.2d 97 (9th Cir. 1956), cert. granted, 25 U.S.L. WEEK 3133 (U.S. Aug. 31, 1956) (No. 371).

5. *White's Will v. Comm'r*, 142 F.2d 746 (3d Cir. 1944); *Monjar v. Comm'r*, 140 F.2d 263 (2d Cir. 1944); *McCarthy v. Comm'r*, 139 F.2d 20 (7th Cir. 1943); *Denholm & McKay Co. v. Comm'r*, 132 F.2d 243 (1st Cir. 1942); *Swall v. Comm'r*,